IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 14262 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GUNVATNRAI M VAIDYA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 14262 of 1993

MR PV HATHI for Petitioner No. 1

MR BY MANKAD, AGP for Respondents No. 1

NOTICE SERVED for Respondent No.2-3

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 30/01/2002

ORAL JUDGEMENT

1. Gunwantrai M.Vaidya, petitioner has filed this petition with a prayer to quash and set aside the order dated 06th October, 1993, passed by Secretary, Panchayat

& Rural Housing Development Department - respondent No.1 herein and consequent order dated 25th November, 1993, passed by the District Panchayat through District Development Officer, Junagadh - respondent no.2 herein by declaring the same as illegal and unconstitutional.

2. The facts giving rise to this petition are as under:-

2.1 The petitioner joined as Junior Clerk in 1951 and worked on promotion as Senior Clerk and Accountant from 1958 to 1981. On 25.8.81 petitioner was promoted as Taluka Development Officer and served in various talukas in Jamnagar, Kachchh and Junagadh Districts. The petitioner retired on 30th June, 1988.

2.2 It was submitted that while discharging his duties as Administrator he was required to immediately decide the issue of giving octroi Ijara for the Nagar Panchayat as required by Sec.180 of the Gujarat Panchayats Act. Immediately after joining as Administrator he was required to hold a public auction of the said Ijara where the upset price for the Ijara of octroi from 31.3.87 to 31.3.88 was fixed and at the said auction held on 17.3.87 one Mr.J.R.Lakhani was found to be the highest bidder quoting Rs.5,62,500/- amongst 10 other bidders at the said auction. All the bidders had deposited Rs.5000/- at the auction and the highest bidder was required to immediately deposit further 15% of the bid amount accepted by the panchayat within the specified time.

2.2(A) As the bid of Shri Lakhnai was accepted, the deposit of Rs.5000/- paid by other bidders were returned and Shri Lakhani was called upon to pay 15 per cent amount of the quotation of his bid immediately by a registered letter. The said letter returned unserved with an endorsement that there was no such person of the name Shri R.J.Lakhani in the town meaning thereby that the name of said Shri Lakhani was a fake name and there was no such bidder. In view of the aforesaid facts since the said Lakhani was not available and not traceable, Ijara was to be given to the next highest bidder. However petitioner did not do anything to entrust the said Ijara to any of the bidders in the said auction but unilaterally chose to give the said Ijara to one Naranbhai Hamirbhai Bamrotia who was not even a party to the said auction which was held on 17th March, 1987.
2.2(B) The petitioner submits that the District Panchayat issued a notice after suspending the said resolution on 16.1.88 to the petitioner and was called

upon to explain why the Ijara was given without holding a fresh public auction. The petitioner filed his reply on 12.3.88 to the District Panchayat. The District Panchayat suspended the said resolution and petitioner was also served a chargesheet dated 28.6.88 just two days prior to his retirement containing five charges arising from the said octroi ijara and was called upon to file his written explanation within 21 days from the receipt of the chargesheet. The said chargesheet was issued for holding a departmental inquiry against him as required by the Gujarat Civil Service (Discipline & Appeal) Rules, 1971 (hereinafter referred to as `the Discipline Rules').

2.2(C) The petitioner gave detailed reply stating that (1) he had taken charge as Administrator only on 3.3.87 the balance in the panchayat was only Rs.7105.30p and the outstanding bills of electricity and water supply were more than Rs.71,143/- and the outstanding arrears amount for the retired employees were Rs.19,501/-, (2) if the said amount together with the salary amount for March 1987 amounted to Rs.1,30,000/- and more and if the said amount were not paid at the end of the month, the water supply, electricity etc., were likely to be disrupted and therefore the immediate decision to give Octroi Ijara was required to be taken and (3) considering the terms of the agreement it was thought fit to immediately give Ijara at the upset price and there was no other motive or intention to suffer a loss as alleged and there was a condition in the earlier agreement that loss, if any, would be recoverable from the highest bidder who had not come forward.

2.2(D) The petitioner by his letter dated 1.6.90 requested the department to let him know as to what has happened to the said departmental enquiry. The department issued an order on 24.4.90 converting the said departmental enquiry into one under Rule 189-A of the Rules instead of Disciplinary Rules of 1971.

2.2(E) The petitioner submits that the Special Officer for Departmental Inquiries submitted his report on 31.8.90 to the department and the petitioner received a letter dated 15.11.90 together with the said report of the Inquiry Officer calling upon him to submit his reply within 15 days from the receipt of the said letter which was received by the petitioner on 19.11.90. It was found from the said report of the Inquiry Officer that he had held charge No.1 not proved and charges No.2 to 5 were held proved. The petitioner again filed his detailed reply on 31.1.91. The respondent passed an order dated 6.10.93 imposing a penalty of reduction of Rs.500/- per

month in his pension amount for a period of five years in exercise of its powers conferred by Rule 189-A of the Rules. The department also passed consequent order on 25.11.93 in this behalf.

3. Mr.P.V.Hathi, learned advocate for the petitioner has raised following contentions before me at the time of hearing of this petition.

(1) The impugned order dated 6.10.1993 is without jurisdiction having been passed under the disciplinary rules, which rules have ceased to apply to the petitioner as he retired on 30.6.1988 and that no notice was issued to the petitioner about reduction of pension of the petitioner.

(2) Even assuming that the power under Rule 189-A can be exercised it was incumbent upon the respondent to issue notice and was required to give an opportunity to the petitioner before passing the impugned order of reduction in pension (see letter dated 11.2.92 Annexure-E, page 32) and, therefore, the order is passed in breach of the principles of natural justice.

(3) The impugned order is passed on mere suspicion and conjectures, where no evidence was led by the department to show that the petitioner was alone responsible for the so-called technical irregularities in respect of the work carried out by the contractor and the said order does not deal with the facts and figures given by the petitioner in order to show that he could not have been made responsible for the technical lapses committed by other engineers.

(4) The order (Annexure-F) is a non-speaking order and no findings are arrived at by the disciplinary authority independently after considering the detailed reply of the petitioner.

(5) The impugned order is otherwise unreasonable and unjust inasmuch as the petitioner having earned high appreciation of his work and after having clean record of 37 years in different cadres including that of the Accountant, there was no justification to impose penalty of reduction in pension on the enquiry commenced which is two days before his retirement.

(6) Even assuming that he was rightly found guilty, the penalty as imposed is excessive and is disproportionate to the charges levelled against him.

(7) The terms and conditions on which the octroi can be given for which he has particularly relied upon Clause 6 of the said condition in which a discretion has been given to the authority to accept any other demand/amount in connection with octroi Ijara. The clause also provides that even person who has offered less amount then the person who has already offered lower amount, if the offer is reasonable then the authority has right to accept the same.

4. In view of the aforesaid contentions he submitted that this petition is of 1993 and petitioner has already retired from service and therefore without raising other contention in the petition he has pressed the last two contentions and stated that in view of the fact that petitioner had served the department for 37 years and chargesheet was issued only two days prior to his retirement and he has already retired in 1988 and this matter has been taken up in 2002, no useful purpose would be served in deciding the matter but if penalty imposed by the department may be reduced then it will meets the ends of justice.

4.1 In support of the same he has relied upon the judgment of this Court in the case of KALUSINH GAMALSINH VS. DEPUTY SECRETARY, HOME DEPARTMENT & ANR. REPORTED IN 34(2) GLR 1278. In that case the learned Single Judge in para 7 considered the judgment of the Hon'ble Apex Court in the case of Ex-Naik Sardar Singh Vs. Union of India & Others reported in 1991(3) SCC 213 and thereafter again considered the judgment of the Hon'ble Apex Court in the case of Ranjit Thakur Vs. Union of India reported in 1987(4) SCC 611. After considering the said judgment in para 8 the Court has considered the matter and in para 9 in facts and circumstances of the case the learned Judge has reduced the penalty in this behalf which reads as under:

"Para.8 The aforesaid observations make it abundantly clear that the approach of the Disciplinary Authority while imposing punishment should be rational and reasonable. Every misconduct does not call for a severe penalty of dismissal or removal. The nature of misconduct

is to be kept in mind while imposing the penalty. The right to impose penalty carried with it the duty to act justly. The penalty imposed must be commensurate with the gravity of the misconduct and any penalty disproportionate to the gravity of the misconduct would be violative of Art.14 of the Constitution of India. Oscar Wilde's dictum, "MODERATION IS A FATAL THING. NOTHING SUCCEEDS LIKE EXCESS" cannot be accepted in the present day context in the country wedded to the principle of equality before the law in the matter of employment. There must be graded punishment for graded misconduct because that penalty is just which fits the misconduct and does not suffer from undue mitigation or immoderate exaggeration."

"Para.9 In view of the aforesaid observations, it is necessary for this Court to examine as to whether the penalty imposed by the competent authority can be said to be reasonable, rational and in proportion to the misconduct committed by the petitioner-delinquent. It is required to be noted that the misconduct was committed while the petitioner was in service. It is also true that the misconduct cannot be viewed leniently and that too for an officer serving in the police force. At the same time, it shall have to be kept in mind that the employee is already out of employment as he has retired from service. There is no possibility of his repeating the misconduct and therefore impugned penalty cannot be said to have preventive objective. This penalty has, even no deterrent effect so far as the employee is concerned. The employee is simply required to be reminded of the lapses committed by him and that reminder can be given by deduction of token amount from his pension. I, therefore, view the penalty in this case as one which actually has no deterrent or preventive effect, vis-a-vis, the employee. It serves the purpose of setting up an example or teaching a lesson to class of erring employees and thereby restores and satisfies the ego of the employer that an erring employee is not permitted to go scot free despite his retirement. The employer thereby establishes that his writ or whip runs even beyond retirement. Such a punishment should not be harsh and excessive. In my view, depriving retired Head Constable of the amount of Rs.75/-p.m. from pension for a period of five

years would work too harsh and excessive and hence unreasonable in the present day of rising prices. Therefore, in the facts and circumstances of this case, without laying any precedent, I quash and set aside the impugned order of penalty passed by the Deputy Secretary, Home Department and substitute the same by reduction of an amount of Rs.45/- p.m. from the amount of pension payable to the petitioner-delinquent for a period of five years. The deduction at the rate of Rs.75/-p.m. which is already effected from the amount of pension payable to the petitioner may be set off so as to work out the same at the rate of Rs.45/-p.m. for a period of five years from the date of the order passed by the competent authority."

4.2 In view of the same he submitted that penalty amount may be reduced in this behalf.

5. Shri B.Y.Mankad, learned AGP appears for the State and he has invited my attention to the affidavit filed by Mr.R.N.Ninama, Under Secretary working under the respondent No.1. In para 5 of the said affidavit the deponent of the affidavit has stated that the auction for giving Octroi Ijara was to be held on 17.3.1987 of Menderda Nagar Panchayat, Dist. Junagadh. It was stated that as many as 11 parties who were willing to offer various amounts ranging from 5,62,500/- to 4,51,000/- for the said Ijara. It was stated that one Mr.J.R.Lakhani offered an amount of Rs.5,62,500/- for the auction. It was stated that since said Lakhani was not available and traceable, Ijara was to be given to the next highest bidder. It was stated that petitioner did not do anything to entrust the said Ijara to any of the bidders in the said auction but unilaterally chose to give the said Ijara to one Naranbhai Hamirbhai Bamrotia who was not even a party to the said auction which was held on 17.3.1987.

5.1 It was further stated that by giving the said Ijara to said Shri Bamrotia, a loss of Rs.1,11,000/approximately was caused to the Nagar Panchayat of which the petitioner was an Administrator and Taluka Development Officer. It was stated that the loss was ultimately to be borne by the respondent No.1 since the respondent no.1 is required to give grant to the Nagar Panchayat. It was further stated that had the petitioner given to the next highest bidder of the said auction, the said loss of Rs.1,11,000/- could have been avoided. However, the petitioner did not do so and

unilaterally without following the procedure and contrary to the rules gave the Ijara to the said Shri Bamrotia.

5.2 In view of the same, the Government decided to initiate a departmental inquiry against the petitioner for the alleged act. It was stated that the Government served the petitioner with a chargesheet dated 28.6.88 to which the petitioner gave reply on 29.8.88. Thereafter the Government appointed an inquiry officer on 13.3.89 to conduct departmental inquiry in pursuance of the chargesheet served upon the petitioner and the reply received from the petitioner.

5.3 It was further stated that the Inquiry Officer recorded statement of the Presenting Officer and other witnesses and also of the petitioner and the petitioner further gave a detailed reply on 5.9.1989. It was further stated that the petitioner was to superannuate on 30.6.1988 and therefore the Government under Rule 189-A and B of the Bombay Civil Services Rules 1959 (hereinafter referred to as `the Rules') suggested to continue the inquiry against the petitioner. It was stated that the Inquiry Officer completed the inquiry and in the said inquiry charges No.2, 3, 4 and 5 were held to be proved against the petitioner and the said report was furnished to the petitioner by letter dated 15.11.90 and the petitioner was asked to make his submissions in connection with the report before inflicting the punishment for the charges held proved against him in the report.

5.4 It was further stated that petitioner by his letter dated 4.2.92 made his submissions in pursuance of the notice issued on 15.11.90 by the respondent No.1 to the petitioner. It was stated that the reply of the petitioner was considered by the respondent No.1 and after the deliberation and proper application of mind and keeping in mind the relevant rules and the proceedings of the case the respondent No.1 passed an order dated 6th October, 1993 after consultation with G.P.S.C. since the petitioner was a Class-II officer and since consultation with the G.P.S.C. was required. It was further stated that the said order at Annexure `F' has been passed after due deliberation and proper application of mind and after complying with the necessary procedure and in accordance with law.

5.5 In view of the same, the Government passed the order on 6.10.93 reducing the pension of the petitioner by imposing a cut of Rs.500/- p.m. for a period of 5 years as is permissible under Rule 189-A of the Rules.

5.6 In view of the same, the order passed by the authority is legal and valid in this behalf. The deponent of the affidavit has also relied upon the Division Bench judgment of this Court (Coram: B.N.Kirpal, CJ (as he was then) and S.D.Dave, J. (as he was then) by its judgment dated 4th March, 1994, decided in LPA No.517 of 1993 in SCA No.7022 of 1992 reported in 35(1) GLR 625.

6. On the other hand, learned advocate for the respondent-State has tried to support the order of the authority by which the authority has imposed to cut off Rs.500/- pension for the period of five years by the order dated 25th November, 1993 and also the order dated 6th October, 1993 which has been passed against the petitioner in this behalf. The order in terms held that a serious charges levelled against the petitioner for incurring loss to the Panchayat and he has not used his discretion properly and the inquiry officer has therefore held that he is liable for the same and ultimately under Rule 189-A and B of the the Rules the authority imposed penalty to cut off Rs.500/- pension for the period of five years.

7. I have considered the case of the petitioner in this behalf. In my view the action of the Octroi Ijara was to be held on 17.3.1987 of Menderda Nagar Panchayat, District Junagadh. There were as many as 11 parties who were willing to offer various amounts ranging from Rs.5,62,500/- to Rs.4,51,000/- for the said Ijara. One Mr.J.R.Lakhani offered an amount of Rs.5,62,500/- for the said auction. It is no doubt true that Mr.Lakhani was not available and not traceable but normally discretionary power of the authority the petitioner could have been given said Ijara to next highest bidder. However petitioner did not do anything to entrust the said Ijara to any of the bidders in the said auction but unilaterally chose to give the said Ijara to one Naranbhai Hamirbhai Bamrotia, who was not even a party to the said auction. In my view, by giving said Ijara to other person, the petitioner has clearly committed illegality in giving said Ijara to other person who was not a person who has participated in the said auction.

7.1 In my view, by giving said Ijara to Shri Bamrotia, the Nagar Panchayat incurred a loss of approximately Rs.1,11,000/- for which petitioner is liable for this loss. In my view, the loss was ultimately borne by respondent No.1 since respondent No.1

was required to give grant to said Nagar Panchayat. In my view, had the petitioner given to the next highest bidder of the said auction, the said loss of Rs.1,11,000/- could have been avoided. The petitioner did not do so and unilaterally without following the procedure and contrary to the rules gave the Ijara to said Shri Bamrotia.

7.2 In my view the Government has properly initiated inquiry against the petitioner and a proper charge sheet has also been issued on 28.6.88. In my view the Government has also thereafter properly appointed inquiry officer on 13.3.89 to conduct departmental inquiry in pursuance to the charge sheet served upon the petitioner.

7.3 I have also considered the report of the inquiry officer who completed inquiry. In my view the report of the inquiry officer is proper when he has held that the charges No.2,3,4 and 5 were held to be proved against the petitioner. I have gone through the record of the case in this behalf. In view of the report the charges against the petitioner is proved. In my view after considering the reply of the petitioner and after due deliberation the respondent authority passed an order after consulting the GPSC since the petitioner was a Class-II officer and since consultation with the GPSC was required. In my view the said order is passed with due deliberation and in compliance with the rules of natural justice. Hence I do not find any infirmity in the said order and I do not interfere with the said order as the same is legal and valid.

8. In view of the same, the order passed by the authority is upheld. However, the Government may grant necessary pensionary benefits other than the subject matter of the petition to the petitioner within three months from today. In view of the same, the petition is rejected with no order as to costs. Rule is discharged. Interim relief if any granted earlier shall stand vacated.

(K.M. Mehta, J.)

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